Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1997

JOHN C. BESTROM,

Petitioner,

vs.

BANKERS TRUST COMPANY, AS TRUSTEE FOR HOLDERS OF DLJ MORTGAGE ACCEPTANCE CORP., MORTGAGE PASS-THROUGH CERTIFICATES, ASSIGNEE OF MORTGAGEE, QUALITY MORTGAGE USA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN C. BESTROM
3821 Washburn Avenue South
Minneapolis, Minnesota 55410
(612) 929-4444

Petitioner, Pro Se

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Eighth Circuit err in determining that the Truth in Lending Act, 15 U.S.C. § 1601 et seq. did not apply to the loan transaction in this case?

PARTIES TO THE PROCEEDING

The parties to the proceeding are petitioner John C. Bestrom and Respondent Bankers Trust Company as Trustee for Holders of DLJ Mortgage Acceptance Corp., Mortgage Pass-Through Certificates, Assignee of Mortgagee, Quality Mortgage USA, Inc. Petitioner was the plaintiff in the district court and respondent was the defendant in the district court.

Petitioner John C. Bestrom respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as 114 F.3d 741 John C. Bestrom v. Bankers Trust Company as Trustee for Holders of DLJ Mortgage Acceptance Corp., Mortgage Pass-Through Certificates, Assignee of Mortgagee, Quality Mortgage USA, Inc., (8th Cir. 1997). The decisions of the District Court and the Bankruptcy Court are unpublished. Copies of the relevant orders are submitted in the Appendix.

STATEMENT OF JURISDICTION

Petitioner John C. Bestrom seeks review of the Order of the United States Court of Appeals for the Eighth Circuit which was filed on May 29, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULES INVOLVED

This appeal involves interpretation of the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq (1994) (TILA). The text of relevant portions of the Truth in Lending Act are set forth in the Appendix.

STATEMENT OF THE CASE

Appellant, John C. Bestrom, is a self-employed business consultant and commodities broker. Bestrom's income is based almost exclusively on commissions from his business ventures. Due to business shortfalls, Bestrom fell behind in his home mortgage payments to his mortgagee, First Bank, and foreclosure proceedings on his home were initiated in 1993. To avoid the foreclosure, Bestrom approached Quality Mortgage, U.S.A. ("Quality"), predecessor in interest to Bankers Trust Company ("Bankers Trust") to obtain a loan to refinance his debt with First Bank. During this time period First Bank caused Bestrom's Home to be sold by the sheriff at a foreclosure sale and the six-month period of redemption began to run. Later, however, First Bank extended Bestrom's redemption period to permit him to obtain refinancing and redeem. On January 25, 1994, Bestrom closed on a loan with Quality, and Bestrom redeemed from First Bank thereby satisfying First Bank's mortgages on his home. At that closing, however, Quality violated the Truth in Lending Act (TILA) by failing to provide Bestrom with a notice of his right to rescind the transaction as required by federal law. Based on this violation, on July 12, 1995, Bestrom notified Bankers Trust that he was rescinding the January 25, 1994 loan. Bankers Trust refused to honor Bestrom's rescission and failed to terminate its security interest in Bestrom's home as required by TILA. Because of his difficult financial position, on July 27, 1995, Bestrom filed for relief under Chapter 7 of the Bankruptcy Code, and on August 30, 1995, Bestrom commenced an adversary proceeding against Bankers Trust for the TILA violations. The parties brought cross motions for summary judgment, and on February 7, 1996, the Bankruptcy Court dismissed Bestrom's Complaint and denied his Motion for Summary Judgment on the Counterclaims of Bankers Trust. On July 16, 1996, the United States District

Court for the District of Minnesota affirmed the Bankruptcy Court's Order in all respects. On March 12, 1997, the United States Court of Appeals for the Eighth Circuit affirmed the Judgment of the District Court. The basis for jurisdiction in the District Court was 28 U.S.C. § 158(a), the basis for appellate jurisdiction was 28 U.S.C. § 158(d) and 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Eighth Circuit made a determination that the Truth in Lending Act (TILA) did not apply to the loan transaction in the instant case. The Eighth Circuit Court of Appeals determined that Bestrom's interest in his home was terminated by First Bank's foreclosure, therefore his loan from Quality/Bankers Trust was an "acquisition loan" used by Bestrom to repurchase his home from First Bank. This determination conflicts with the law of the State of Minnesota and is a departure from the accepted course of judicial proceedings as analyzed and set forth by the United States District for the District of Minnesota, analyzing Minnesota law in United States v. Ryan, 124 F.Supp. 1 (D.Minn. 1954). The U.S. Court of Appeals for the Eighth Circuit correctly found that Ryan held that the Minnesota Registrar of Titles cannot recognize any involuntary transfer of property unless and until the Registrar receives a court order directing a particular action. Petitioner contends that this holding controls the instant case in that First Bank, the foreclosing Mortgagee, never legally obtained title to the subject property because Bestrom redeemed pursuant to the extension and therefore no court order was ever issued directing the Registrar of Titles to transfer ownership of the Property to First Bank pursuant to the foreclosure. Thus, Bestrom's loan from Quality/Bankers Trust was not used to repurchase his home and was not an "acquisition loan" within

the meaning of TILA. Rather, Bestrom's loan from Bankers Trust was used to redeem from the foreclosure sale and was a refinance transaction and subject to TILA, therefore Bankers Trust's failure to honor Bestrom's rescission violated his rights under TILA. The Eighth Circuit Court of Appeals found, however, that Ryan was inapposite to the present case because Ryan involved perfection of Federal tax liens rather than transfer of title after a mortgage foreclosure sale. To the contrary, the Ryan Court's interpretation of Minnesota law specifically applied to the transfer of title after a mortgage foreclosure sale. Petitioner contends that the attempted distinction made by the Eighth Circuit Court of Appeals is incorrect and that the holding of Ryan applies and controls in the instant case, and therefore, TILA did in fact apply to the loan transaction in this case, and was violated by Respondent, entitling Petitioner to his remedies under TILA.

Petitioner requests the Supreme Court of the United States to address the impossible situation which now exists in interpreting the application of federally legislated consumer rights and remedies under TILA to Minnesota law involving loans used to redeem from mortgage foreclosures.

Respectfully submitted,

JOHN C. BESTROM
3821 Washburn Ave. S.
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(612) 929-4444

Petitioner, Pro Se

INDEX TO THE APPENDIX

1. Order of the United States Court of Appeals for Eighth Circuit dated May 29, 1997 .....App. A

2. Order of the United States District Court for the District of Minnesota dated July 16, 1996 .....App. B

3. Memorandum Order of the United States Bankruptcy Court, District of Minnesota dated February 7, 1996.....App. C

4. Text of Relevant Sections of Truth in Lending Act .....App. D

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-3190

In re John C. Bestrom, debtor.	*	
	*	
John C. Bestrom,	*	
	*	
Appellant,	*	
	*	
v.	*	Appeal from the United
	*	States District Court for
Bankers Trust Company, as	*	the District of Minnesota.
Trustee for Holders of DLJ	*	
Mortgage Acceptance Corp.,	*	
Mortgage Pass-Through	*	
Certificates, Assignee of	*	
Mortgagee, Quality Mortgage	*	
USA, Inc.,	*	
	*	
Appellee.	*	

Submitted: March 12, 1997

Filed: May 29, 1997

Before MAGILL,[1] MURPHY, Circuit Judges, and GOLDBERG,[2] Judge.

GOLDBERG, Judge.

Appellant John C. Bestrom ("Bestrom") seeks to rescind his mortgage agreement under the Truth In Lending Act, 15 U.S.C. §§ 1601 et seq. (1994) ("TILA"), without repaying the mortgage lender. Bestrom contends that he should not be required to repay the loan principal as a condition of exercising the recission rights under TILA because the lender failed to provide him with notice of his right to rescind the mortgage within 3 days of the consummation of the transaction, as required under TILA, 15 U.S.C. § 1635(a), 12 C.F.R. § 226.15(b).

In an adversary proceeding filed by Bestrom against Bankers Trust Company, assignee of Quality Mortgage USA, Inc. ("Quality Mortgage"), the bankruptcy court[3] denied Bestrom's motion for summary judgment on the grounds that TILA did not apply. The bankruptcy court found that the pre-bankruptcy loan made by Quality Mortgage constituted an acquisition loan to obtain title from the prior mortgage holder, First Bank, N.A. ("First Bank"), to whom Bestrom was already in default. Acquisition loans are specifically excepted from the recission provision of TILA. 15 U.S.C. § 1635(e)(1)(A). Bestrom appealed the bankruptcy court's

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[1] The Honorable Frank J. Magill, was an active judge at the time that this case was submitted and assumed senior status on April 1, 1997, before the opinion was filed.

[2] The Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

[3] The Honorable Nancy C. Dreher, United States Bankruptcy Court Judge for the District of Minnesota.

decision to the district court, and, on July 16, 1996, the district court affirmed.[4]

In the instant appeal, Bestrom continues to argue that TILA applies to the loan transaction. Bestrom contends that the loan was not for the purpose of acquiring title to the property because First Bank never had legal title to the property in the first place. Therefore, as a matter of law, the Quality Mortgage loan that Bestrom used to pay down First Bank's mortgage could not have been an acquisition loan within the meaning of TILA. Rather, according to Bestrom, the transaction was a refinancing of the property. We find that First Bank did have legal title to the property, and therefore, we affirm the district court.

I.

In 1976, Bestrom obtained a loan from First Bank to build his home ("the property"). At that time, he executed a security agreement and mortgage in favor of First Bank. As a result of financial difficulties, Bestrom defaulted on the payments to First Bank. First Bank commenced foreclosure proceedings in early 1993, which resulted in the bank purchasing the property at a publicly held auction on April 6, 1993. On the same day, First Bank recorded the Certificate of Sale in the Hennepin County Registrar of Titles. The public sale triggered Bestrom's state law rights under Minn. Stat. Ann. § 580.23, subd. 1 (West 1988), to redeem the property within six months from the date of sale if Bestrom repaid the original loan.

After the public sale, Bestrom and First Bank entered into several written agreements extending his state law rights of redemption in order to permit Bestrom to obtain the necessary

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[4] The Honorable Michael J. Davis, United States District Court Judge for the District of Minnesota.

financing to redeem the property. The last written agreement extended Bestrom's rights of redemption to December 30, 1993. Bestrom failed to redeem the property, and, pursuant to Minn. Stat. Ann. § 580.12 (West 1988), the recording of the sale certificate operated as a conveyance to First Bank "of all the right, title, and interest" in the property upon expiration of the statutory period of redemption.

On January 4, 1994, First Bank sought to gain possession of the property by commencing an unlawful detainer action in state court against Bestrom as a hold-over tenant. On January 20, 1994, the court issued a writ of restitution, which entitled First Bank to eject Bestrom from the property.

During the state court proceedings, First Bank and Bestrom continued to discuss the possibility of Bestrom repurchasing the property. On January 25, 1994, Bestrom successfully completed the closing of a new loan from Quality Mortgage and began to execute a series of transactions designed to transfer the mortgage from First Bank to Quality Mortgage. Using the proceeds of the Quality Mortgage loan, Bestrom gave First Bank $285,000 to pay off the first mortgage. In return, First Bank conveyed its interest in the property to Bestrom by quit claim deed. Bestrom also borrowed an additional $85,222 from Quality Mortgage in order to satisfy a subordinate mortgage held by Citicorp and to pay the closing costs. Bestrom then executed a Mortgage (the "Mortgage") and an Adjustable Rate Note (the "Note") in favor of Quality Mortgage, thereby pledging the property as collateral.

In connection with the loan agreement, Quality Mortgage prepared a federal Truth-In-Lending disclosure statement dated January 11, 1994. On January 18, 1994, Bestrom, who was represented by legal counsel at the time, signed a waiver of his TILA rights to rescind the Note and the Mortgage within 3 days of the signing of the loan agreement. Prior to the closing of the loan, Quality Mortgage again provided

Bestrom with a federal Truth-in-Lending disclosure statement, dated January 20, 1994, which set forth the terms of the loan. This second disclosure statement did not give Bestrom notice of any TILA rights to rescind or cancel the transaction.

On April 15, 1994, Quality Mortgage assigned its interest in the Note and the Mortgage to Bankers Trust. Bestrom made four monthly mortgage payments under the Note and the Mortgage and then defaulted. Bankers Trust foreclosed its interest in the Mortgage and purchased the property at a publicly held sale on January 27, 1995.

The second foreclosure and public sale caused Bestrom to take a number of legal actions designed to protect his interest in the property. By letter dated July 12, 1995, Bestrom attempted to exercise his federal rights to rescind the Mortgage transaction pursuant to TILA. On July 27, 1995, the date that his state law six-month period of redemption was due to expire, Bestrom filed for relief under Chapter 7 of the Bankruptcy Code, identified the property as his homestead, and claimed an exemption in it. On August 30, 1995, Bestrom filed this adversary proceeding against Bankers Trust, alleging that as a result of Quality Mortgage's failure to provide him with notice of his right to rescind the January 25, 1994 Mortgage in violation of TILA, 15 U.S.C. § 1635(a), 12 C.F.R. § 226.15(b), the court should void the mortgage security interest, not require Bestrom to repay the loan, and award him penalties, costs and attorneys fees under 15 U.S.C. § 1640.

The bankruptcy court held that TILA did not apply to the Mortgage transaction between Bestrom and Quality Mortgage because the court found that the loan was excepted from TILA's coverage under 15 U.S.C. § 1635(e)(1)(A). This provision excepts a "residential mortgage transaction," which is defined as "a transaction in which a mortgage...is created or retained against the consumer's dwelling to finance the

acquisition or initial construction of such dwelling." 15 U.S.C. § 1602(w).

The bankruptcy court determined that the loan transaction between Quality Mortgage and Bestrom came within the scope of the residential mortgage transaction exemption because Quality Mortgage's loan was used to pay off the mortgage held by First Bank so that Bestrom could acquire title to the property.

II.

Bestrom's appeal rests on whether title to the property passed to First Bank as a result of the April 6, 1993 public sale, and whether title was re-acquired by Bestrom from First Bank as a result of the series of transactions commenced on January 25, 1994. We review the bankruptcy court's legal conclusions with respect to this issue de novo. Miller v. Farmers Home Administration (In re Miller), 16 F.3d 240, 242-43 (8th Cir. 1994).

Under Minnesota law, the rule is that once a purchaser acquires a property at a public sale and the redemption period expires, no further conveyance is necessary for the title to vest legally and equitably in the purchaser:

> The certificate shall be recorded within 20 days after such sale, and when so recorded, upon expiration of the time for redemption, shall operate as a conveyance to the purchaser or the purchaser's assignee of all the right, title, and interest of the mortgagor in and to the premises named therein at the date of such mortgage, without any other conveyance.

Minn. Stat. Ann. § 580.12 (West 1988).

In Johnson v. First National Bank of Montevideo, 719 F.2d 270, 276 (8th Cir. 1983), we stated:

> It is long-settled under Minnesota Law that foreclosure extinguishes the mortgage and that the purchaser at the foreclosure sale acquires a vested right to become the absolute owner of the property upon expiration of the redemption period, or, in lieu thereof, to receive the payment of the purchase price plus interest. In Re Klein, 9 F. Supp. 57, 59 (D. Minn. 1934); In Re Stacy, 9 F. Supp. 61, 64 (D. Minn. 1934), and cases cited therein. The mortgagor, on the other hand, retains only the equity of redemption, plus the rights to possession, rents, and profits of the property during the period of redemption. Id.

See also Farmers and Merchants Bank of Preston v. Junge, 458 N.W.2d 698, 700 (Minn. Ct. App. 1990) ("It is established law that title to property purchased at a mortgage foreclosure vests upon expiration of the redemption period.").

In the present case, First Bank gained title to the property because, after purchasing the property at the April 6, 1993 public sale and recording the certificate of sale the same day, Bestrom failed to redeem the property within the six month period of redemption. Thus, under Minn. Stat. Ann. § 580.12, First Bank acquired "all the right, title, and interest" in the property on October 6, 1993, the date that the statutory period of redemption expired, or on December 30, 1993, the date to which Bestrom's statutory rights of redemption were extended by agreement of the parties. No further conveyance was necessary. Minn. Stat. Ann. § 580.12. Therefore, First Bank held legal title to the property before the series of transactions, initiated on January 25, 1994, between Bestrom, First Bank and Quality Mortgage.

Bestrom, nevertheless, contends that title never passed to First Bank after the April 6, 1993 sale because First Bank did not obtain a court order prior to registering title. Bestrom mistakenly relies on United States v. Ryan, 124 F. Supp. 1 (D. Minn. 1954), for support. Ryan involved the perfection of federal tax liens on real property under the title registration system in Minnesota. Ryan ruled that the Minnesota Registrar of Titles cannot recognize any involuntary transfer of property unless and until the Registrar receives a court order directing a particular action. Ryan, 124 F. Supp. at 5.

Bestrom is incorrect that passage of title following a foreclosure sale is contingent upon registration pursuant to a court order. First, the case upon which Bestrom relies for this position, Ryan, is inapposite to the present case because it involved perfection of federal tax liens, rather than transfer of title after a foreclosure sale.

Second, Bestrom's position conflicts with Minnesota's statute governing registration after foreclosure sales. According to Minnesota's statute,

> Any person who has, by an action or other proceeding to enforce or foreclose a mortgage, lien, or other charge upon registered land, become the owner in fee of the land, or any part thereof, may have the title registered.

Minn. Stat. Ann. § 508.58 (West 1990).

The plain language of Minn. Stat. Ann. § 508.58, clearly provides that a party who has become the owner of property following a mortgage foreclosure "may" subsequently register the title. Thus, even if the purchaser has not acquired a new certificate of title, the purchaser already possesses legal title to the property. Title fully vests when the statutory redemption period expires. See Johnson v. First National Bank of Montevideo, 719 F.2d 270, 276 (8th Cir. 1983).

Therefore, the court holds that First Bank held legal title to the property at the expiration of the redemption period. The bankruptcy court and district court ruled according to law when they determined that the loan from Quality Mortgage was to acquire title to the property from First Bank and, therefore, TILA does not apply to the transaction.

III.

Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:
John C. Bestrom,
Debtor

BKY 4-95-3927
Chapter 7

John C. Bestrom,
Plaintiff/Appellant

v.

Banker's Trust Company, as Trustee for Holders of DLJ Mortgage Acceptance Corp., Mortgage Pass-Through Certificates, Assignee of Mortgagee, Quality Mortgage USA, Inc.,

Defendant/Appellee

Adv. Proc. No. 4-95-257 NCD
Civ. No. 3-96-236

This action is before the Court on Plaintiff/Appellant John C. Bestrom's appeal from the Bankruptcy Court's order denying Plaintiff's Motion for summary judgment and granting Defendant/Appellee's motion for summary judgment.

Facts

This case involves the foreclosure of a mortgage covering the property at 2650 Burnham Road, Minneapolis, Minnesota, 55416, and a pending Chapter 7 Bankruptcy

proceeding. Bestrom originally had financed the home through a mortgage to First Bank. When Bestrom defaulted on that mortgage, First Bank foreclosed and purchased the property at a publicly held auction. Bestrom thereafter failed to redeem within the time allowed for redemption. First Bank then brought an unlawful detainer action against Bestrom as he was still residing in the home after the period of redemption had passed.

Bestrom contacted Quality Mortgage USA, Inc. in an attempt to obtain financing to pay off First Bank, and another loan from Citicorp. On June 25, 1994 Quality closed the loan transaction with Bestrom, which proceeds were used pay off First Bank and Citicorp. At the closing, Bestrom executed a mortgage in favor of Quality, and a Uniform Residential Loan Application. First Bank then conveyed its interest in the property to Bestrom by quit claim deed in consideration for the receipt of $285,000.

Thereafter, Bestrom defaulted on the Quality mortgage. Quality moved to foreclose, and Bestrom countered with a claim against Quality alleging a violation of the Truth in Lending Act (TILA). Bestrom's claim is that the truth in lending form provided Bestrom did not contain a notice of right to rescind.

The Bankruptcy Court, Nancy Dreher, has found in favor of Appellee, finding that TILA did not apply as the loan between Bestrom and Quality was for the purpose of acquiring the property from First Bank, not a restructuring of a loan. Because such an acquisition loan is specifically excepted by language in TILA, Judge Dreher held that Bestrom's claim has no merit. Bestrom also challenges Judge Dreher's determination that the remedy he is seeking is not warranted by the facts or the law. Finally, Bestrom challenges Judge Dreher's denial of his motion for summary judgment as to Appellee's counterclaims.

Standard of Review

On appeal to the district court, the bankruptcy court's legal conclusions are subject to de novo review. In re Apex Oil, 884 F.2d 343 (8th Cir. 1989). The bankruptcy court's findings of fact are subject to a clearly erroneous standard of review. Bankruptcy Rule 8013.

Analysis

Based on a review of the record and consideration of the submissions of Bestrom and Appellee, and arguments of counsel, the Court concludes that Bankruptcy Judge Dreher's Order is neither clearly erroneous nor contrary to law.

Accordingly, **IT IS HEREBY ORDERED** that:

Bankruptcy Judge Nancy C. Dreher's order and final judgment dated February 7, 1996 is AFFIRMED.

Dated: 7-16, 1996.

s/s
Michael J. Davis
United States District Court

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

JOHN C. BESTROM, BKY 4-95-3927

Debtor.

JOHN C. BESTROM,

Plaintiff,

-vs- ADV 4-95-257

BANKERS TRUST COMPANY, AS TRUSTEE FOR HOLDERS OF DLJ MORTGAGE ACCEPTANCE CORPORATION, MORTGAGE PASS THROUGH CERTIFICATES, ASSIGNEE OF QUALITY MORTGAGE USA, INC.

Defendant.

MEMORANDUM ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

At Minneapolis, Minnesota on this 7th day of February, 1996.

The above-entitled matter came on for hearing before the undersigned on January 24, 1996, and arises by cross-motions for summary judgment filed by the plaintiff, John C. Bestrom ("Bestrom"), and the defendant, Bankers Trust Company as Trustee for the Holders of DLJ Mortgage Corporation,

Mortgage Pass Through Certificates, Assignee of Quality Mortgage USA, Inc. ("Bankers Trust"). Appearances were noted in the record.

FACTS

1. This adversary proceeding centers around certain transactions related a home which was owned and built by Bestrom in 1976 that is located at 2650 Burnham Road and legally described as Tract B, Registered Land Survey No. 943 ("the Property"). The Property constitutes his principal dwelling.

2. Bestrom executed a security agreement and mortgage in favor of First Bank National Association ("First Bank") which pledged the Property as collateral for the repayment of indebtedness.

3. As a result of financial difficulties, Bestrom defaulted on the payments to First Bank and, consequently, First Bank instituted foreclosure proceedings.

4. On April 6, 1993, First Bank foreclosed on the mortgage security interest it held on the Property. First Bank purchased the Property at a publicly held auction. The Sheriff's Certificate of Sale and Foreclosure was recorded in the office of the Hennepin County Registrar of Titles on the date of the sale.

5. Pursuant to Minn. Stat. § 580.13, Bestrom's statutory right of redemption period was due to expire on October 6, 1993, six months from the date of the sale. Between October 4, 1993, and December 3, 1993, Bestrom and First Bank entered into various recorded agreements to extend his right of redemption in order to permit Bestrom to obtain financing with which to redeem the Property. The last written recorded agreement reached by the parties extended Bestrom's right of redemption to December 30, 1993. Bestrom failed to redeem the Property. See Minn. Stat. § 580.12 (providing that upon

the expiration of the statutory period of redemption, the recordation of a sheriff's certificate "shall operate as a conveyance to the purchaser...of all the right, title, and interest of the mortgagor...without any other conveyance").

6. On January 4, 1994, First Bank commenced an unlawful detainer action against Bestrom as a hold-over tenant in the Hennepin County District Court alleging that the redemption period had expired and that, by virtue of the expiration thereof, First Bank acquired "all right, title, and interest" in the Property. The matter came on for trial on January 13, 1994. A writ of restitution, which entitled First Bank to eject Bestrom in order to obtain possession of the Property, was issued by the state court on January 20, 1994.

7. Despite the writ of restitution, Bestrom and First Bank apparently continued to have discussions in the month of January about Bestrom's desire to retain the Property.[1]

8. Bestrom contacted Quality Mortgage USA, Inc. ("Quality") and attempted to obtain financing. In connection with the loan application, Quality, among other things, obtained financial statements from Bestrom covering a twenty-four month period in order to verify his assets, income, and expenses, conducted a credit check, and secured an appraisal of the Property. After reviewing the aforementioned information and considering the loan application, Quality

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[1] Bestrom asserts that despite the previous written agreements, First Bank "orally" agreed to extend his "right of redemption" even further, a fact which Bankers Trust vehemently denies. The statute of frauds precludes such a contention as a matter of law. See Minn. Stat. § 513.04. Moreover, the facts of this case clearly negate Bestrom's averment. For example, a certificate of redemption was never executed, delivered, or recorded, see Minn. Stat. § 580.26, rather, legal right to the property was acquired by the conveyance of a quit claim deed. The fact that Bestrom was never actually dispossessed of the Property has absolutely no bearing in this case on the legal import of the expiration of the redemption period.

agreed to extend credit to Bestrom in order to allow him to purchase the Property from First Bank.

9. Quality prepared a Federal Truth in Lending Disclosure Statement dated January 11, 1994, which reflected the terms of the loan. The loan was originally scheduled to close on January 18, 1994, but that closing never occurred. The closing was canceled due to a controversy with First Bank regarding the amount owed on the underlying mortgages and what lump sum amount First Bank would be willing to accept in order to allow Bestrom to obtain title to the Property.

10. On January 18, 1994, in anticipation of the closing which did not occur, Bestrom, who was represented by counsel at the time, executed a handwritten waiver of his right to rescind the mortgage transaction which provided as follows:

> Please waive the three (3) day right to cancel my loan from Quality Mortgage USA, Inc. because if I do not pay First Bank System on time, I will lose my house. This will create a grave financial hardship to me.

11. The closing was rescheduled to January 25, 1994. On January 25, 1994, First Bank agreed to give Bestrom until January 31, 1994, to repurchase the Property. First Bank agreed to deliver a quit claim deed to the Property to Bestrom for $285,000.

12. Bestrom received a new Federal Truth in Lending Disclosure Statement from Quality, dated January 20, 1994, which set forth the terms of the loan. That Disclosure Statement did not give Bestrom notice of a right to rescind or cancel the transaction. Bestrom executed the Disclosure Statement and a mortgage in favor of Quality at the closing on January 25, 1994. At the closing, Bestrom also signed a Uniform Residential Loan Application that was prepared by Quality.

13. First Bank conveyed its interest in the Property at the time of closing on January 25, 1994, to Bestrom by quit claim deed in consideration for the receipt of $285,000.[2]

14. The Quality note and mortgage was assigned to Bankers Trust. The assignment was recorded on April 15, 1994.

15. Bestrom defaulted on his obligations under the note and mortgage by failing to make any payments thereunder.

16. Bankers Trust foreclosed on its mortgage and purchased the Property at a sheriff's sale that was held on January 27, 1995.

17. On July 12, 1995, Bestrom gave notice to Bankers Trust that he was exercising his right to rescind the mortgage transaction pursuant to the Truth in Lending Act.

18. Bestrom's statutory six-month period of redemption was due to expire on July 27, 1995.

19. On July 27, 1995, Bestrom filed a voluntary petition under Chapter 7 of the Bankruptcy Code and identified the Property as his homestead and claimed an exemption in it. As a result, the redemption period was due to expire on September 25, 1995.

20. Bestrom commenced the above-entitled adversary proceeding by Complaint filed on August 30, 1995, alleging that Quality failed to provide him with notice of his right to rescind the loan transaction as required by the Truth in Lending Act ("TILA"), 15 U.S.C. § 1635 and 12 C.F.R. § 226.15(b) (Regulation Z), and essentially seeks: 1.) to have the security interest in the Property held by Bankers Trust declared "null and void and that Bestrom retain fee title to the Property free and clear of any claim of" Bankers Trust; 2.) an award of statutory damages including costs and attorneys' fees

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[2] Bestrom also borrowed an additional $85,222.13 from Quality in order to satisfy a mortgage held by Citicorp and to pay for the costs of closing.

pursuant to the TILA; and 3.) to exercise his right of rescission and, due to his financial condition and Quality's alleged violation of the TILA, not be required to return any of the funds advanced by Quality which enabled him to acquire the Property.

21. Bankers Trust generally denied the allegations of the Complaint, interposed a number of affirmative defenses in its Answer, and Counterclaimed for the imposition of a constructive trust and for a judgment of nondischargeability under 11 U.S.C. 523(a)(2)(A) and (a)(2)(B). Bankers Trust essentially alleges in its Counterclaim that Bestrom submitted false financial statements and made certain material misrepresentations in order to obtain the funds necessary to acquire the Property.

22. Pursuant Rule 7065 of the Federal Rules of Bankruptcy Procedure, Bestrom brought a motion for the issuance of a temporary injunction in order to toll the redemption period pending resolution of the above-entitled adversary proceeding. By order entered on September 26, 1995, this Court suspended the redemption period and enjoined Bankers Trust from taking any action to foreclose on the Property.

23. Bestrom moved for summary judgment on its claim under the TILA and seeks a judgment in his favor under § 523(a)(2). Bankers Trust also moved for summary judgment under the TILA and opposes the summary disposition of its § 523(a)(2) action on the grounds that genuine issues of material fact remain for trial.

CONCLUSIONS OF LAW

I. SUMMARY JUDGMENT STANDARDS

Summary judgment is governed by Federal Rule of Civil Procedure 56, and made applicable to this adversary

proceeding by Bankruptcy Rule 7056. Federal Rule 56 provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). The moving party on summary judgment bears the initial burden of showing that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the moving party is the plaintiff, it carries the additional burden of presenting evidence that establishes all elements of the claim. Id. at 324; United Mortgage Corp. v. Mathern (In re Mathern), 137 B.R. 311, 314 (Bankr. D. Minn. 1992), aff'd, 141 B.R. 667 (D. Minn. 1992). The burden then shifts to the nonmoving party to produce evidence that would support a finding in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-52 (1986). This responsive evidence must be probative, and must "do more than simply show that there is some metaphysical doubt as to the material fact." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

In examining the evidence, the court is often required to determine whether the respondent's theory on the facts is "implausible." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1480 (6th Cir. 1989). The court may gauge the reasonableness of competing inferences asserted on the same basic evidence. Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 681 (9th Cir. 1985); Mathern, 137 B.R. at 322. The reasonableness of asserted inferences is measured against the viability of the legal theory which they are asserted to support,

and is also controlled by the weight and probity of the evidence advanced to support them. Mathern, 137 B.R. at 322-23. However, a summary judgment motion is not an appropriate occasion for weighing the evidence but, rather, should be limited to determining whether there is a genuine issue for trial. Lohorn v. Michal, 913 F.2d 327, 331 (7th Cir. 1990). The ultimate question is whether reasonable minds could differ as to the factual interpretation of the evidence of record. Mathern, 137 B.R. at 323 (citing Liberty Lobby, 477 U.S. at 250-52).

It is significant to note that the mere filing of cross-motions for summary judgment does not establish that there is no genuine issue for trial or obligate the court to render judgment notwithstanding the fact that the parties have separately alleged an absence of material fact. Rather, cross-motions for summary judgment must be considered separately and do not relieve the court of its responsibility to determine the appropriateness of a summary disposition or have the effect of submitting the cause to a plenary determination on the merits. Wermager v. Cormorant Township Bd., 716 F.2d 1211, 1213 (8th Cir. 1983); United States v. Porter, 581 F.2d 698, 703 (8th Cir. 1978); Security Bank & Trust Co. v. United States, 31 Cl. Ct. 589, 592 (1994). See generally Shook v. United States, 713 F.2d 662, 665 (11th Cir. 1983) (indicating that where the parties disagree as to the facts and take inconsistent legal theories, the mere filing of cross-motions for summary judgment does not warrant the entry of judgment for one party or the other). It is therefore incumbent upon the court to independently determine whether there exists a genuine issue of material fact with respect to each motion:

> Cross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the

> other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist. If any such issue exists it must be disposed of by a plenary trial and not on summary judgment.

Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (3d Cir. 1968). In order to justify the entry of summary judgment on cross-motions for summary judgment then, the moving party must demonstrate that there is no dispute as to any material facts, with the evidence and all inferences drawn therefrom viewed for each motion in the light most favorable to the nonmoving party. If any fact issue that is material exists, a court must not make findings but, rather, is required to deny the motion and proceed to trial.

II. TRUTH IN LENDING ACT

A. *Applicability*

The Truth in Lending Act was enacted to promote full disclosure of consumer credit so that debtors could make informed choices in credit transactions. Hickman v. Cliff Peck Chevrolet Inc., 566 F.2d 44, 46 (8th cir. 1977). Indeed, the expressed purpose of the TILA is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . ." 15 U.S.C. § 1601(a). See 12 C.F.R. § 226.1(b). The TILA therefore mandates the disclosure of certain information in financing agreements to specified consumers, see 12 C.F.R. § 226.15(b), and enforces that mandate by imposing what frequently amounts to a system of strict liability in favor of consumers when certain disclosures are not made. Rowland v. Magna Millikin Bank, 812 F. Supp. 875, 878 (C.D. Ill. 1992)

(concluding that the TILA should be construed liberally in favor of the consumer and its requirements impose absolute compliance such that even technical violations may form the basis of liability).

In addition to providing for the imposition of both statutory and actual damages when a lender fails to make the mandated disclosures, see 15 U.S.C. § 1640, the TILA and its implementing administrative federal regulation, Regulation Z, give consumers the right to rescind certain transactions secured by the consumer's principal dwelling:

> [I]n the case of any consumer credit transaction . . . in which a security interest . . . is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required . . . by notifying the creditor . . . of his intention to do so . . . .

Id. § 1635 (a). See 12 C.F.R. § 226.23(a). Assuming that there has not been a valid waiver of the right of disclosure, see 15 U.S.C. § 1635(d); 12 C.F.R. § 226.15(e),[3] a consumer debtor has a continuing right to rescind which extends up to three years after becoming obligated on the loan if the required disclosures are not made. Rudissel v. Fifth Third Bank, 622 F.2d 243, 247 (6th Cir. 1980); Dougherty v. Hoolihan, Neils, & Boland, Ltd., 531 F. Supp. 717, 721 (D. Minn. 1982). See

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[3] Bankers Trust argues that Bestrom effectively waived his right of rescission. In light of the holding in the instant case, this Court need not resolve this issue.

15 U.S.C. § 1635(f). However, the TILA creates a statutory exemption or exclusion from the disclosure requirements for "residential mortgage transactions." 15 U.S.C. § 1635(e)(1)(A). See 12 C.F.R. § 226.23(f).

> The term "residential mortgage transaction" means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling.

15 U.S.C. § 1602(w) (emphasis added). See 12 C.F.R. § 226.2(a)(24). Thus, an obligor does not have the right to rescind, or a concomitant right to receive notice thereof, in circumstances in which a lender furnishes the money with which the debtor "acquires" his or her principal dwelling. The strictures of the TILA are simply inapplicable to such transactions as a matter of law.

In ascertaining whether a security interest in a consumer's dwelling was created or retained to "finance the acquisition" of the residence, or whether the particular transaction is a "residential mortgage transaction" and thus exempt from the TILA's disclosure requirements, it is the substance, rather than the form, of the transaction which controls. Hickman v. Cliff Peck Chevrolet, 566 F.2d 44, 46 (8th Cir. 1977); Heuer v. Forest Hill State Bank, 728 F. Supp. 1199, 1200 (D. Md. 1989), aff'd, 894 F.2d 402 (4th Cir. 1990). Thus, the labels the parties may use to characterize the nature of the transaction are not dispositive.

In the instant case, the evidence is overwhelmingly clear. The loan transaction between Bestrom and Quality was executed with the intention that it would provide the financing necessary to acquire the Property lost due to foreclosure. The

financing was acquisition financing, not, as Bestrom argues, financing obtained for the purpose of restructuring existing indebtedness. Upon the expiration of the statutory period of redemption as extended by agreement of the parties to December 30, 1993, Bestrom's right of redemption was completely extinguished and First Bank accordingly acquired "all the right, title, and interest" to the Property. Minn. Stat. § 580.12. See supra note 1. See also Spaude v. State Bank (In re Spaude), 112 B.R. 304, 306 (Bankr. D. Minn. 1990) ("Under Minnesota law, a sheriff's sale in proceedings for foreclosure by advertisement discharges the mortgage against the subject real estate, even as security for the debt. After the sheriff's sale, the rights of the parties are no longer fixed by the terms of the mortgage; rather they are governed by Minn. Stat. ch. 580. When a mortgagee is the successful bidder at the sale..., the parties' prior debtor-creditor relationship is extinguished," as is the mortgage debt. (citations omitted)). The record is clear that Bestrom retained absolutely no legal interest whatsoever in the Property at that point but merely remained in possession as a hold-over tenant.

The loan transaction at issue is of a type expressly excepted by the TILA from the duty to give notice of a right to rescind and, thus, the statutory right to rescind which serves as the basis for Bestrom's Complaint in this case is nonexistent as a matter of law.

B. *Rescission*

Assuming, arguendo, that the TILA were applicable to the disputed loan transaction in the instant case, this Court is of the view that the remedy Bestrom seeks in connection with his right of rescission is not warranted by the facts or law.

The purpose of the right of rescission under the TILA is to restore the parties, as far as practicable, to the status quo ante. FDIC v. Hughes Dev. Co., Inc., 684 F. Supp. 616, 620

(D. Minn. 1988). That is, the sin qua non of rescission is to place the parties to the dispute into the same positions they occupied before the agreement was made which requires each party to give back what each received. Dougherty v. Hoolihan, Neils, & Boland, Ltd., 531 F. Supp. 717, 721-22 (D. Minn. 1982); Heritage Fed. Credit Union v. Cox (In re Cox), 162 B.R. 191, 195 (Bankr. C.D. Ill. 1993). See 15 U.S.C. § 1635(b) (requiring the debtor to tender the money or property received under the transaction to the creditor or, if impracticable, the reasonable value thereof upon the performance of the creditor); 12 C.F.R. § 226.23(d). It is generally recognized that rescission under the TILA is an equitable remedy and courts have the discretion to expressly condition the relief of rescission upon the debtor's prior return of those funds which were received. FDIC v. Hughes Dev. Co., Inc., 938 F.2d 889, 890 (8th Cir. 1991), cert. denied, 502 U.S. 1099 (1992); Powers v. Sims & Levin, 542 F.2d 1216, 1221 (4th Cir. 1976) ("[S]urely the Congress did not intend to require a lender to relinquish its security interest when it is now known that the borrowers did not intend and were not prepared to tender restitution of the funds expended by the lender in discharging the prior obligations of the borrowers."). Such a result does not ipso facto change because the debtor finds himself in bankruptcy. See, e.g., Lynch v. GMAC Mortgage Corp. (In re Lynch), 170 B.R. 26, 30-31 (Bankr. D. 1994). Although certain factual contexts occasionally dictate a contrary result, see, e.g., Myers v. Federal Home Loan Mortgage, 175 B.R. 122, 128-29 (Bankr. D. Mass. 1994), allowing Bestrom to obtain the remedy he prayed for--a declaration that First Bank's security interest in the Property is null and void, an award of damages, and finding that he is not required to return either the Property or any of the purchase-money advanced--is palpably inequitable as it would provide Bestrom, who has not made a single payment toward the satisfaction of the indebtedness, with a windfall at the expense

of Bankers Trust. The remedy of rescission under the TILA was designed to serve an equitable, not a punitive, function. Thorp Loan & Thrift Co. v. Buckles (In re Buckles), 189 B.R. 752, 764-66 (Bankr. D. Minn. 1995). As noted by one court in similar circumstances:

> [I]t is clear from the [pleadings] that the Debtors never intended to comply with § 1635(b) and restore the status quo ante. They want to keep the residence, void the mortgage, obtain a refund of all charges or interest, and repay the loan by discharging it as an unsecured debt. There are no other terms to describe their approach other than to describe it as one based on greed and manipulation, as they are attempting to keep the residence without paying for it.

In re Cox, 162 B.R. at 197. See generally Williams v. Homestake Mortgage Co., 968 F.2d 1137 (11th Cir. 1992); LaGrone v. Johnson, 534 F.2d 1350, 1362 (9th Cir. 1976); FDIC v. Hughes, 684 F. Supp. 616, 625 (D. Minn. 1988) (conditioning rescission upon the debtor's return or tender of the amount advanced); In re Buckles, 189 B.R. at 752 (conditioning the receipt of the benefits of rescission upon tender of repayment despite fact that debtor was in bankruptcy). Although as a Chapter 7 debtor Bestrom may be entitled to a "fresh start," he is not entitled to the "head start" that he is seeking with the invocation of the TILA.

III. SECTION 523(a)(2)(A) & (a)(2)(B)

Bestrom has also moved for summary judgment on the Counterclaim of Bankers Trust which is predicated upon 11 U.S.C. § 523(a)(2)(A) and (a)(2)(B). A cause of action predicated upon the aforementioned provisions requires a

subjective evaluation of all the facts and circumstances of a particular case, especially since Bestrom's intent is a necessary element that is common to both. When construing the facts in the light most favorable to Bankers Trust as required under Rule 7056 of the Federal Rules of Bankruptcy Procedure, there are factual issues which can only be resolved by virtue of a trial on the merits. As such, a summary disposition of First Bank's Counterclaim is inappropriate in this case.

Accordingly, and for reasons stated, IT IS HEREBY ORDERED THAT:

1. The motion of the defendant, Bankers Trust Company, as Trustee for Holders of DLJ Mortgage Acceptance Corporation, Mortgage Pass Through Certificates, Assignee of Quality Mortgage, USA, Inc., for summary judgment is in all things GRANTED. The defendant is entitled to a judgment dismissing the Complaint with prejudice on the merits.

2. The motion of the plaintiff, John C. Bestrom, for summary judgment is in all things DENIED.

3. Trial on the defendant's Counterclaim will proceed as previously scheduled.

SO ORDERED.

s/s

Nancy C. Dreher
United States Bankruptcy Court

§ 1602. Definitions and rules of construction.

* * *

(w) The term "residential mortgage transaction" means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling...

§ 1635. Right of rescission as to certain transactions.

(a) Disclosure of obligor's right to rescind

Except as otherwise provided in this section, the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also

provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

(b) Return of money or property following rescission

When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to

FEDERAL SUPPLEMENT

VOLUME 124

UNITED STATES of America,
Plaintiff,
v.
Kenneth S. RYAN, Minnesota Federal Savings and Loan Association, Ralph D. Peltz, Edward C. Engdahl and the City of St. Paul, Defendants.
Civ. A. No. 2400.

United States District Court
D. Minnesota, Third Division.
Sept. 29, 1954.

Suit by United States to establish and enforce federal tax liens and claims, for the foreclosure thereof and to obtain a judgment and decree that defendants had purchased the real estate subject to liens. The District Court, Bell, J., held that, under the Minnesota Torrens Law, notice of federal tax liens which United States had filed in office of Register of Deeds under debtor's name, without description of property, and which were not memorialized on Torrens certificates applicable to the registered land, did not give United States a lien enforceable against purchasers after foreclosure by advertisement of prior mortgage.

Order in accordance with opinion.

1. Federal Civil Procedure 2540

Where plaintiff and answering defendants in suit by United States to establish tax liens against land entered

stipulation of facts, summary judgment could be entered. Fed.Rules Civ.Proc. rule 56(b), 28 U.S.C.A.

2. Records 9(5, 13¼)

In Minnesota, the registration of titles under the Torrens Law is under the jurisdiction of the state district court, and the original registration and all sub sequent involuntary transfers of title are accomplished by obtaining a decree of the court followed by the issuance of a certificate of title thereunder. M.S.A. § 508.01 et seq.

3. Records 9(1)

The basic principle of the Torrens system is the registration of the title to the land, instead of registering, as under the old system, the evidence of such title. M.S.A. § 508.01 et seq.

4. Records 9(13¼)

Under the Minnesota Torrens Law, the procedure upon an involuntary transfer, such as a mortgage foreclosure, differs from the procedure on a voluntary transfer, and the registrar cannot, upon the filing with him of documents purporting to make an involuntary transfer, recognize any such transfer unless and until he receives an order of the court directing the action he should take. M.S.A. §§ 508.26, 508.28.

5. Records 9(13)

Under the Minnesota Torrens Law, when a certificate of title has been issued by the registrar of titles pursuant to a decree of the state district court, the decree is binding upon the entire world, subject only to the right of appeal. M.S.A. §§ 508.26, 508.28.

6. Records 9(3)

The purpose of the Minnesota Torrens Law is to establish an indefeasible title free from any and all rights or claims not registered with the registrar of titles, with certain exceptions, so that anyone may deal with such property with the assurance that the only rights or claims of which he need take notice are those registered. M.S.A. § 508.1 et seq.

7. Internal Revenue 1713

Under Minnesota statute authorizing the filing of notices of federal tax liens, Minnesota laws must be complied with if a valid lien is to be obtained in any case. 26 U.S.C.A. § 3672; M.S.A. §§ 272.48, 508.48, 508.64.

8. Internal Revenue 1713

Where property against which United States claimed federal tax liens was registered under Minnesota Torrens Law, Minnesota laws dealing with registered property applied and controlled. 26 U.S.C.A. § 3672; M.S.A. §§ 272.48. 508.48, 508.64.

9. Internal Revenue 1713, 1714

In view of federal statute which provides a method by which a state may require that federal tax liens be made a matter of local record, federal tax liens were not liens which state could not require to be recorded, and were not within Minnesota Torrens Law exception to requirements relating to the filing of liens against registered lands. 26 U.S.C.A. § 3672; M.S.A. § 508.25.

10. Records 9(13¼)

The mere filing of a notice, by debtor's name only, in the office of the register of deeds cannot, and does not, create a lien on land registered under the Minnesota Torrens Act. M.S.A. §§ 272.48, 508.48, 508.64.

11. Records 9(13¼)

Under Minnesota statute authorizing the filing of federal tax liens with the register of deeds, notice of lien, in case of property registered under Torrens Law, must be filed with the register of deeds in his capacity as registrar of titles, and to be effective they must be noted as memorials on the certificate of title covering the specific parcel of registered land. M.S.A. 272.48, 508.48, 508.64.

12. Records 9(1)

Minnesota statute providing that registers of deeds shall be registrars of titles under Torrens Law did not create a new or separate office, but simply created a new branch in the office of register of deeds. M.S.A. § 508.30.

13. Records 9(13¼)

Under 1949 amendment to Minnesota statute relating to the filing of federal tax liens, in order to obtain a valid lien against property registered under the Torrens Law, the notice of lien must be filed as required by Torrens Law provisions. M.S.A. §§ 272.48, 508.48, 508.64; 26 U.S.C.A. § 3672.

14. Records 9(13¼)

Under Minnesota law, both old age assistance liens and mechanics' liens against land registered under Torrens Law must be filed with the registrar of titles and noted as memorials on the certificate of title. M.S.A. §§ 256.26, subd. 5, 272.48, 508.01 et seq., 514.08, 514.12.

15. Internal Revenue 1713, 1714

Where the United States fails to file a tax lien as required by the state statute, it is not a valid lien. 26 U.S.C.A. § 3672.

16. Records 9(13)

Under the Minnesota Torrens Law, a memorial of a mortgage, lien or other charge against registered land, entered by the registrar of titles upon the original certificate of title in his office and upon the owner's duplicate, becomes a part of the certificate of title and is made conclusive evidence of the matters therein contained. M.S.A. § 508.01 et seq.

17. Records 9(13¼)

Under the Minnesota Torrens Law, unregistered deeds or contracts do not affect Torrens titles nor create any interest in land, since the Torrens Law intends that all titles registered thereunder shall be free from all unregistered rights or claims except those specifically made. M.S.A. § 508.01 et seq.

18. Records 9(13)

The Minnesota Torrens Law abrogates the doctrine of constructive notice, except as to matters noted on the certificate. M.S.A. § 508.01 et seq.

19. Internal Revenue 1713, 1716

A tax lien asserted will not become a valid lien unless notice thereof is filed as by state law prescribed, and a state law affecting title to property must be followed and is binding upon the United States.

20. Records 9(13¼)

Under the Minnesota Torrens Law, notice of tax liens which United States had filed in office of register of deeds under debtor's name, without description of property, and which were not memorialized on Torrens certificates applicable to the registered land, did not give United States an enforceable lien. 26 U.S.C.A. § 3672; M.S.A. §§ 256.26, subd. 5, 508.48, 508.64.

21. Records 9(13¼)

Where United States asserted tax lien against Minnesota land which had been registered under Torrens; Law, but had not perfected lien by filing notice as required, it could have perfected its lien, at any time up to foreclosure of prior mortgage, by properly filing the lien. 26 U.S.C.A. § 3672; M.S.A. §§ 256.26, subd. 5, 508.48, 508.64.

22. Mortgages 356

Under Minnesota law, a mortgage containing a power of sale may be foreclosed by advertisement.

23. Mortgages 378

There is no provision in the United States Code which prohibits a foreclosure under a power of sale or which provides that the United States will not be bound thereby. 28 U.S.C.A. § 2410.

24. Mortgages 356, 378

Where mortgage contained a power of sale, mortgagee was entitled to foreclose by advertisement, and the United States, which asserted subsequent tax lien, along with all other parties interested in property, was bound by the foreclosure.

25. Judgment 828(3.54)

Where United States had failed properly to file its notice of tax lien against the property registered under Minnesota Torrens Law, state court decree after foreclosure proceedings directing registrar to cancel the then outstanding certificate of title and to issue a new certificate showing mortgagee to be fee owner operated as an estoppel at law, and United States could not thereafter claim an interest in the property. M.S.A. § 508.01 et seq.

26. Records 9(13)

In absence of fraud, a decree in a Minnesota Torrens Law registration proceeding binds the entire world. M.S.A. §§ 508.22, 508.26, 508.28, 508.57, 508.58.

27. Records 9(13, 13¼)

Under Minnesota law, a Torrens title is indefeasible and good against the entire world and cannot be attacked after six months have elapsed, and the owner of a certificate or a purchaser of registered property need not go behind the certificate to ascertain if there are any claims which do not appear upon the certificate, and, unless a lien or claim is noted as a memorial on the certificate, it is not a lien against the registered interest of the owner. M.S.A. § 508.01 et seq.

George T. Rita, Sp. Asst. to the Atty. Gen., and George E. MacKinnon, U. S. Atty. for State of Minnesota, St. Paul, Minn., for plaintiff.

John B. Burke, of Scott, Burke & Scott, St. Paul, Minn., for defendant Minnesota Federal Savings & Loan Ass'n.

Moritz J. Blomquist, of Randall, Smith, Blomquist & Krawetz, St. Paul, Minn., for defendants Ralph D. Peltz and Edward C. Engdahl.

BELL, District Judge.

This suit involves real estate registered under the Torrens System of land registration in Minnesota. It is to establish and enforce certain liens and claims, for the foreclosure thereof and to obtain a judgment and decree of this Court that the defendants Ralph D. Peltz and Edward C. Engdahl purchased the real estate subject to the lien claimed by the United States.

Answers were interposed on behalf of the defendants Minnesota Federal Savings and Loan Association, Peltz and Engdahl. Defendants Kenneth S. Ryan and the City of St.

Paul are in default for failure to answer or otherwise appear in the action. The plaintiff and answering defendants filed motions for a summary judgment.

[1] A stipulation of the facts was made by the plaintiff and the answering defendants and it follows that there can be no error in this case in entering summary judgment. Rule 56(b), Fed.Rules of Civil Procedure, 28 U.S.C.A.; Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886.

The only issues remaining for determination by the Court involve questions of law. The ultimate issue can be resolved into a single question. Does plaintiff have a lien against the property?

It is the claim of the defendants that the plaintiff, in the first instance, did not take proper steps to perfect a lien as required by the laws of the United States and the State of Minnesota, and that, because of its failure properly to file notice of its alleged lien, the plaintiff did not acquire a lien against the property. It is also the claim of the defendants that by virtue of the foreclosure of the prior mortgage held by Minnesota Federal Savings and Loan Association, followed by a decree of the State District Court directing the issuance of a new certificate of title, the plaintiff has lost its right to perfect a claim of lien and is estopped from asserting any interest in the property.

Plaintiff contends that the filing of a notice of tax lien, by name only, in the office of the register of deeds was sufficient to create a lien against property registered under the Torrens System.

As this action involves the title to Property registered under the Torrens System of land registration, adopted by the State of Minnesota in 1901, Chapter 237, Laws of Minnesota 1901, and amendments thereof, now Chapter 508, Minnesota Statutes Annotated, a brief history of the Torrens System and its purpose is deemed necessary and in order.

The Torrens System, so called, is a result of an idea and the work of Sir Robert Richard Torrens, born in Ireland in 1814, educated in Trinity College, Dublin, collector of customs at Adelaide in 1841, and afterwards the first premier of South Australia. His idea was to apply the principles of registration of ownership in ships under the English law known as the "Merchants Shipping Act" to registration of title to lands. That is, to have land ownership conclusively evidenced by certificate and thereby made determinable and transferable quickly, cheaply and safely.

The idea gained favor in Australia, resulting in the framing of what became known as the Torrens Act and the adoption of the system in practically all Australia not later than 1870.

The Torrens Law, as originally drafted, has been greatly modified in the statutes enacted in the United States, but the salient feature of registration by certificate has been retained, and the law is usually referred to as the Torrens Law wherever statutes providing for registration of title to land have been enacted in this country. Statutes embodying the basic principles of the Torrens System of land registration by certificate have been enacted in nineteen states of the United States.

[2, 3] The registration of the title to property results in the transferring of a title from the recording act system to the certificate system, provided by the Torrens Law, by a judicial proceeding in the nature of a suit to quiet title against all persons, both known and unknown, who could by any possibility assert an adverse interest. In the State of Minnesota the registration of titles is under the jurisdiction of the District Court. The original registration, and all subsequent involuntary transfers of title, is accomplished by obtaining a decree of the Court followed by the issuance of a certificate of title thereunder.

"The official certificate will always show the state of the title and the person in whom it is vested. The

basic principle of the system is the registration of the title to the land, instead of registering, as under the old system, the evidence of such title." In re Bickel, 301 Ill. 484, 134 N.E. 76, 80.

[4, 5] In the case of an involuntary transfer, such as a mortgage foreclosure, there is a radical difference from the procedure which applies to a voluntary transfer in that the registrar cannot, upon the filing with him of documents purporting to make an involuntary transfer, recognize any such transfer unless and until he receives an order of court directing the action which he shall take. These orders are all based upon a final adjudication determining the rights of all parties involved. The conclusiveness of the certificate is based upon an order or decree of court and upon statutes of limitation, M.S.A. §§ 508.26 and 508.28. It is clearly evident that, when a certificate of title has been issued by the registrar of titles pursuant to a decree of the District Court the decree is binding upon the entire world, subject only to the right of appeal allowed for a period of six months by M.S.A. § 508.28.

[6] The purpose of the Torrens Law is to establish an indefeasible title free from any and all rights or claims not registered with the registrar of titles, with certain exceptions not important here, M.S.A. § 508.25, to the end that anyone may deal with such property with the assurance that the only rights or claims of which he need take notice are those registered. The law was framed to accomplish that purpose, and it establishes rules in respect to registered land which differ widely from those which apply in case of unregistered land. It provides that the holder of a certificate of title to registered land "shall hold the same free from all encumbrances and adverse claims," excepting only those noted on the last certificate of title.

At the outset it should be pointed out that under 26 U.S.C.A. § 3672, as amended in 1942, it is provided that a federal tax lien shall not be valid as against any mortgagee,

pledgee, purchaser or judgment creditor until notice thereof has been filed by the Collector. The pertinent part of this section is:

> "a. Invalidity of lien without notice. Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—
>
> "(1) * * * In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory".

[7, 8] The State of Minnesota has by statute authorized the filing of such notices, and the laws of the State of Minnesota must be complied with if a valid lien is to be obtained in any case. Because the property involved in this action is registered property, the laws of the State of Minnesota which deal with registered property have application and are controlling here.

M.S.A. § 272.48, provides as follows:

> "The filing and recording in the office of the register of deeds of any county in this state of notices of liens for taxes due the United States and discharges and releases of such liens is hereby authorized."

M.S.A. § 508.48, provides as follows:

> "Every conveyance, lien, attachment, order, decree, or judgment, or other instrument or proceeding, which would affect the title to unregistered land under existing laws, if recorded, or filed with the register of deeds, shall, in like manner, affect the title to registered land if filed and registered with the registrar in the county where the real estate

is situated, and shall be notice to all persons from the time of such registering or filing."

M.S.A. § 508.64, provides as follows:

"Attachments and *liens of every description* upon registered land shall be continued, reduced, discharged, and dissolved by any method sufficient therefor in the case of unregistered land. All certificates, writings, or other instruments permitted or required by law to be filed or recorded to give effect to the enforcement, continuance, reduction, discharge, or dissolution of attachments *or other liens* upon unregistered land or to give notice of the same, shall, in the case of like liens upon registered land, be filed with the registrar."

M.S.A. § 508.30, provides as follows:

"Registers of deeds shall be the registrars of titles in their respective counties."

[9] The form of certificate of title prescribed by M.S.A. § 508.25, contains six exceptions. The plaintiff contends that one of the exceptions applies to the issue involved herein. That exception reads as follows:

"(1) Liens, claims, or rights arising or existing under the laws or the constitution of the United States, which this state cannot require to appear of record".

However, the claim of lien involved in this action is not such a lien or claim, in that 26 U.S.C.A. § 3672, provides a method by which the State may require that it be made a matter of local record and if this is not done a federal tax lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor, namely not unless nor until notice thereof has been filed by the collector in accordance with the laws of the State.

[10, 11] Under said statutes, M.S.A. §§ 508.48 and 508.64, in order to effect the registration by memorial upon a

certificate of title the lien instrument must designate the land affected by the lien or claim of lien, such as is possible in the case of mechanics' lien claims and judgment entries creating specific liens on described real estate, or the party filing a claim of general lien, such as a personal judgment, or a federal tax lien, must designate the land upon which it is claimed so that the registrar may know the certificate of title upon which it can be memorialized. The mere filing of a notice, by debtor's name only, in the office of the register of deeds cannot, and does not, create a lien on registered land. It is plainly evident to this Court that the liens authorized by M.S.A. § 272.48, to be filed with the register of deeds, must, in the case of registered property, be filed with the register of deeds in his capacity as registrar of titles, and to be effective, they must be noted as memorials on the certificate of title covering the specific parcel of registered land intended to be affected by such filing, M.S.A. §§ 508.48 and 508.64.

[12] The office of the register of deeds, in Minnesota, is made up of two component parts. The office of the register of deeds as originally created by Chapter 21, Sec. 1, Laws of Minnesota, 1849, which has to do with the recording of all instruments affecting unregistered property, and the office of the registrar of titles created by Chapter 237, Laws of Minnesota 1901, which is part and parcel of the original office, but which office has special functions to perform in connection with property registered under the Torrens System. It must be remembered that the register of deeds is by statute, M.S.A. § 508.30, the registrar of titles in his county. When a statute authorizes the recordation of an instrument in the office of the register of deeds it can only be interpreted as meaning that as to all properties unregistered the recording can be accomplished by simply filing the document with the register of deeds in his capacity as such, but if the property is registered, it must be filed with the register of deeds in his capacity as registrar of titles, and to effect a lien thereby, the

instrument must be noted as a memorial on the specific certificate of title outstanding for the property intended to be affected, otherwise the filing of the instrument does not create a lien. The method of filing documents intended to affect registered property was, by statute, made definite and certain. No new or separate office was created for the handling of instruments affecting registered property. The Laws of 1901 simply created a new branch in the office of the register of deeds and established certain specific requirements with reference to registered properties. The register of deeds assumed additional duties, and certain additional requirements for the filing of instruments affecting registered property were enacted into law. Since 1901 the register of deeds has been functioning both as register of deeds and as registrar of titles.

[13] In 1949, the legislature of the State of Minnesota in providing for the recording of federal tax liens in the office of the register of deeds, made it necessary, in order to obtain a valid lien against registered property, that the notice be filed as required by M.S.A. §§ 272.48, 508.48 and 508.64. This is because the conformity act of the State of Minnesota in relation to federal statute 26 U.S.C.A. § 3672, insofar as it concerned registered land, was embraced in these three separate sections of the state code. For the purpose of embodying the conformity act into one section, the 1953 Legislature enacted Chapter 488, Laws 1953, which amended the original M.S.A. § 272.48, by adding thereto the pertinent portions of said Sections 508.48 and 508.64, as follows:

> " * * *, or together with a written statement containing a description of each parcel of land upon which the lien is claimed and a proper reference to the certificate or certificates of title to such land, in the office of the registrar of titles, * * *."

[14] An identical situation is presented in Minnesota in connection with old age assistance liens. M.S.A. § 256.26, provided, subd. 5, for the filing of these liens in the office of

the register of deeds. In 1953, by Chapter 487, the Legislature amended this section in a manner similar to the amendment of Sec. 272.48. In 1939 the Attorney General of Minnesota in his opinion, No. 250, Report of the Attorney General, had concluded that purchasers of registered land are not bound by the recordation of the lien statement filed, by name only, with the register of deeds.

The same situation exists with reference to the Minnesota Statutes dealing with mechanics' liens, M.S.A. §§ 514.08 and 514.12. These sections mention filing the lien notice in the office of the register of deeds. Nevertheless as to registered property the filing would be of no value unless the lien statement was filed with the registrar of titles and noted as a memorial on the certificate of title. For this Court to arrive at any other conclusion would render the state statutes dealing with registered property meaningless. That the foregoing use of M.S.A. §§ 508.48 and 508.64 is proper and necessary in construing M.S.A. § 272.48 emphasized in the words of the court in United States v. Beaver Run Coal Co., Cir., 99 F.2d 610, 613, as follows:

> "If an apparently unambiguous statute contains hidden ambiguities, or if a literal construction would clearly defeat the object intended by Congress, or if a literal construction would result in absurdities so gross 'as to shock the general moral sense', then the courts may be entitled to depart from the strict wording in order to give the statute a reasonable construction".

Plaintiff contends that "Minnesota cannot require the United States to memorialize notice of federal tax lien on a certificate of title", and that, "it can do no more than designate in what office the notice of lien shall be filed". As hereinbefore pointed out Minnesota has designated the office in which the notice shall be filed, and, by virtue of the statutory procedure relative to the operation of that office in

respect to registered titles, the notice must contain a description of the land on which the lien is claimed, and the only method for filing it is by memorializing it on the certificate of title.

The same situation exists in the State of Michigan in respect to its unregistered titles.[1] A Michigan statute was held to be constitutional which required that notice of federal tax lien to be effective must contain a description of the land upon which the lien is claimed. In Youngblood v. United States, 6 Cir., 141 F.2d 912, 914, the notice of lien filed did not contain a description of the property and the Court held that the filing of the notice did not create a lien. The Court said:

> "A state's right to safeguard muniments of title to land within its borders should not be lightly denied upon a strained assumption that Congress meant to impeach that right. The amendment contained in the Revenue Act of 1942 evidences no change of attitude on the part of Congress in its recognition of the right of a state to regulate the filing of federal tax lien notices. Under the existing enactment the notice must be filed in an office authorized by the state; or, if no such office has been designated, then in the office of the United States District Court Clerk. Michigan has designated an office, that of the register of deeds; but has not authorized the filing of the notice in the form presented by the collector. In the lien notice under present consideration, an essential ingredient to conform to the state law is missing. The land is not described. Mere inconvenience to federal tax officials in procuring and filing descriptions of land owned by delinquent taxpayers supplies no sound basis for the issuance of peremptory writ of mandamus by a federal court,

[1] Torrens System not in effect in Michigan.

directing a state ministerial officer to violate his obvious duty of compliance with the state law under which he acts.

"We adhere to the view, plainly indicated in our approval of the opinion of District Judge Raymond in the case of United States v. Maniaci [D.C., 36 F.Supp. 293], that there is nothing unreasonable in the requirement of the Michigan statute that a lien notice shall contain a description of the property upon which the lien is claimed, in order to enable such lien to affect the rights of third parties; and that confusion commonly resulting from indices of the names of persons is avoided and reasonable certainty attained by identifying the land upon which the lien is claimed."

[15] Where the government fails to file a tax lien as required by statute, it is not a valid lien. See Miners Savings Bank v. Joyce, 3 Cir., 97 F.2d 973, see also, 174 A.L.R. 1388.

In the case of United States v. Hutcherson, 8 Cir., 188 F.2d 326, 330, in holding that the government did not have a lien against the property involved, the Court said:

"We are invited to depart from this rule of property in Missouri because the existence of the rule and its application to tax liens may make the collection of delinquent tax claims more difficult. We do not conceive it to be an appropriate exercise of the power and authority of a federal court to strike down a rule of property, not repugnant to any law of the United States, long established in the state, and upon which many valuable property rights are based."

And the Court in Warburton v. White, 176 U.S. 484, 20 S.Ct. 404, 409, 44 L.Ed. 555, said:

"Where state decisions have interpreted state laws governing real property or controlling relations which are essentially of a domestic and state nature,

in other words, where the state decisions establish a rule of property, this court when called upon to interpret the state law will, if it is possible to do so, in the discharge of its duty, adopt and follow the settled rule of construction affixed by the state court of last resort to the statutes of the state, and thus conform to the rule of property within the state."

In Tyler v. United States, 281 U.S. 497, loc.cit. 501, 50 S.Ct. 356, loc.cit. 358, 74 L.Ed. 991, the above is reiterated in the following language:

"The decisions of the courts of Maryland and Pennsylvania follow the common law, and are in accord in respect of the character and incidents of tenancy by the entirety. * * * These decisions establish a state rule of property, by which, of course, this court is bound."

See also, Schwarz v. United States, 4 Cir., 191 F.2d 618.

[16-18] The Supreme Court of the State of Minnesota has taken a very definite stand in upholding the validity of titles registered under the Torrens System, and in particular with reference to the necessity for filing notices of claim of lien with the registrar of titles.

"A memorial of a mortgage, lien, or other charge against registered land, entered by the registrar of titles upon the original certificate of title in his office and upon the owner's duplicate, becomes a part of the certificate of title and is made conclusive evidence of the matters therein contained". Horgan v. Sargent, 182 Minn. 100, 233 N.W. 866.

"Unregistered deeds or contracts do not affect Torrens titles nor create any interest in land. The Torrens Law intends that all titles registered thereunder shall be free from all unregistered rights or claims except those specifically named * * *.

"The purpose of the Torrens Law is to establish an indefeasible title free from any and all rights or claims not registered with the registrar of titles, with certain unimportant exceptions, to the end that any one may deal with such property with the assurance that the only rights or claims of which he need take notice are those so registered. The law was framed to accomplish that purpose; and it establishes rules in respect to registered land which differ widely from those which apply in the case of unregistered land. It provides that the holder of a certificate of title to registered land 'shall hold the same free from all encumbrances, and adverse claims, excepting only' those noted on the last certificate of title and certain other specified rights or claims not important here. * * *

"Torrens Law abrogates doctrine of constructive notice, except as to matters noted on certificate". In re Juran, 178 Minn. 55, 226 N.W. 201. See also, Cook v. Luettich, 191 Minn. 6, 252 N.W. 649, and Carl v. DeToffol, 223 Minn. 24, 25 N.W.2d 479.

In State ex rel. Douglas v. Westfall, 85 Minn. 437, 89 N.W. 175, 176, 57 L.R.A. 297, the Court held that the Laws 1901, c. 237, providing for the Torrens System of registering land titles, is not unconstitutional in that it is special legislation; nor that it deprives the owner of his interest in land without due process of law, in violation of both state and federal constitutions. In this case the Court said:

"Any person who has any interest in the land, and who has not actually been served or notified of the filing of the application, may at any time within 60 days from the entry of such decree appear, and file his sworn answer, providing no innocent purchaser for value has acquired an interest. If there is any such purchaser, the decree of registration remains in full

force forever, subject only to the right of appeal, * * *. Every person receiving a certificate of title and every subsequent purchaser in good faith takes the same free from all incumbrances, except such as are noted thereon."

In Kane v. State, 237 Minn. 261, 55 N.W.2d 333, 337, the Court held that a purchaser was not bound by restrictions which were not noted on the certificate of title. The Court said:

"The question before us is whether a good-faith purchaser, for value, of registered land obtains such land free and clear of a restrictive covenant or encumbrance which is not referred to in the certificate of title under the memorial of estates, easements, or charges on the land described. In other words, must a purchaser of registered land, in addition to being charged with notice of estates, mortgages, liens, charges, and interests noted on the previous owner's certificate of title, also go directly to the plat to ascertain whether there may be any other restrictive covenants or encumbrances noted on the plat which are not shown on the certificate of title? Under § 508.25, it is our opinion that he is not required to do so. It seems to us that if we were to hold otherwise, under the facts and circumstances of the instant case, it would tend to create confusion which would jeopardize the stability and purpose of the Torrens law. The manifest purpose of the Torrens system, as stated in 3 Devlin, Real Estate, Deeds (3 ed.) § 1439, is– 'first, to secure by a decree of court, or other similar proceeding, a title which will be impregnable against any attack, and, when this title is once determined, to provide that all subsequent transfers, encumbrances, or proceedings affecting the title shall be placed on a page of the

register and marked on the memorial of title. A purchaser may accept this memorial as truly stating the title, and may disregard any claim not so appearing.'"

[19] The United States is not exempt from the provisions of the state statutes. The laws of the United States definitely provide that the tax lien here asserted will not become a valid lien unless notice thereof is filed as by state law prescribed. A state law affecting the title to property must be followed, and is binding upon the United States. See Custer v. McCutcheon, 283 U.S. 514, 51 S.Ct. 530, 75 L.Ed. 1239.

[20] It is clearly evident that the Supreme Court of the State of Minnesota regards a Torrens title as an indefeasible title, good as against any and all unregistered claims, and that the only instruments which can possibly affect a registered title are those which are filed with the registrar of titles and noted as memorials on the certificate of title. The state laws definitely require the filing of all notices of claim or contract with the registrar. The state decisions support the statutes. Plaintiff did not file its notice of lien as required by the laws of the United States and of the State of Minnesota and therefore does not have a lien against the property involved in this action.

[21-24] At any time, however, up to the time of the foreclosure of the prior mortgage held by Minnesota Federal Savings and Loan Association, the plaintiff could have perfected its lien by filing the notice as by statute required. The foreclosure of the mortgage and the expiration of the period of redemption has now precluded plaintiff from so doing. The mortgage contained a power of sale. Under the laws of the State of Minnesota, a mortgage containing a power of sale may be foreclosed by advertisement. There is nothing in the United States Code which precludes a foreclosure by advertisement. 28 U.S.C.A. § 2410 provides that in any action to foreclose a mortgage the United States

may be joined as a party defendant. But there is nothing in this section, or in any section of the United States Code, which prohibits a foreclosure under a power of sale or which provides that the United States will not be bound thereby. The Minnesota Federal Savings and Loan Association was entitled to foreclose by advertisement, and the plaintiff, and all other parties interested in the property, is bound by the foreclosure. This exact question was before the Court in the case of Trust Co. of Texas v. United States, D.C., 3 F.Supp. 683, and the Court held that a mortgage foreclosure under power of sale extinguishes not only the rights of the owner in the property sold, but all subsequent and inferior liens thereon, including the lien of the United States. Therefore, in the instant case, the foreclosure divested the interest of the registered owner, Kenneth Ryan, and the rights of all parties claiming under or through him, including the plaintiff herein.

[25, 26] The decree of the State District Court entered June 6, 1951, directing the registrar to cancel the then outstanding certificate of title and to issue a new certificate showing Minnesota Federal Savings and Loan Association to be the fee owner of the property, subject only to the contract to Peltz and Engdahl, operates as an estoppel at law, and plaintiff, for this additional reason, cannot now claim any interest in the property. No appeal was taken within six months from the date thereof and this decree cannot now be set aside. In the absence of fraud a decree in a registration proceeding binds the entire world.

M.S.A. § 508.22 provides for the entering of a decree of registration if, after a hearing, the court finds the applicant has a title proper for registration, and that the decree shall forever quiet the title and be forever binding upon all persons.

M.S.A. § 508.26 provides that any person upon whom the summons has not been actually served, and who had no notice or knowledge of the filing of the application, may at any time within 60 days after the entry of such decree, and not

afterwards, file a petition setting forth such facts and praying for leave to file his answer therein.

M.S.A. § 508.28 provides that no action or proceeding for the recovery of any right, title, interest, or estate in registered land, adverse to the title established by a decree of registration, shall be maintained unless such action is commenced within six months from the date of such decree.

M.S.A. § 508.57 provides that mortgages upon registered land may be foreclosed in the same manner as mortgages upon unregistered land, except that in the case of mortgages upon registered land a notice of the pendency of any suit or proceeding to enforce or foreclose the mortgage shall be filed with the registrar at the time of or prior to the commencement of such action or proceeding. In the instant case, Minnesota Federal Savings and Loan Association filed a notice of foreclosure at the time the proceedings were commenced.

M.S.A. § 508.58 provides that any person who has become the owner of registered land by foreclosure of a mortgage or other lien may have his title registered by applying to the Court for a new certificate of title.

Pursuant to the above sections of the state code, Minnesota Federal Savings and Loan Association petitioned for and received a new certificate of title. The decree directing the issuance of this certificate, dated June 6, 1951, cannot now be attacked by plaintiff. In Lamprey v. American Hoist & Derrick Co., 197 Minn. 112, 266 N.W. 434, 439, the Court said:

> "It is expressly provided that no decree or registration shall be adjudged invalid or set aside unless the action to set it aside be commenced within six months from the entry of such decree. * * * The plaintiffs contend that, under Mason's Minn.St.1927, § 9405 [M.S.A. § 548.14], they had an absolute right to bring the action at any time within three years after discovery of the fraud claimed. That section is not a

part of the title registration statute. It provides that an action to set aside a judgment obtained in a court of record on the ground of perjury or fraud may be set aside in an action for that purpose brought within three years after discovery of such perjury or fraud. That statute was enacted and in force long before there was any registration of title law, Chapter 131, L.1877. If it had been intended that this statute should apply to decrees registering title under the registration law, first adopted in 1901 then the registration law (section 8274 [now 508.28, M.S.A.-supplied]) would seem to serve no useful purpose. The registration act is a complete law covering the proceeding, the relief to be had, and the effect of the decree entered thereunder. Containing within itself a specific statute of limitation, we are not permitted to look to some prior statute for a different period of limitation."

In Harrington v. Linkert, 203 Minn. 575, 282 N.W. 461, 462, the Court said:

"'A decree registering title is somewhat more conclusive and better protected from attack or opening up than an ordinary judgment. The decree shall forever quiet the title and be forever conclusive upon all persons named in the summons or proceeded against as parties unknown, and shall not be opened or vacated except as provided in the registration law. It is expressly provided that no decree of registration shall be adjudged invalid or set aside unless the action to set it aside be commenced within six months from the entry of such decree.'"

In Murphy v. Borgen, 148 Minn. 375, 182 N.W. 449, 450, an attempt was made to vacate a decree of registration after the time for answering had expired. The Court in denying the relief prayed for said:

"If the statute were construed to grant that authority to the court, the finality of the decree, the fundamental basis as well as the capstone of the Torrens system of perfecting land titles would disappear, for just what a court may do to the Torrens judgment on application addressed to its equitable powers will find a limit only in the ingenuity of counsel in searching for and devising methods of attack.

"Section 6895 [now 508.28, M.S.A.-supplied] of the act is one of limitations, and cannot be construed as in effect granting the relief which under section 6889 [now 508.22 M. S.A.-supplied] in express language withholds."

[27] The Supreme Court of the State of Minnesota has very definitely decided that a Torrens title is an indefeasible title; that it is good as against the entire world; that a decree in an original proceeding or in a proceeding subsequent, cannot be attacked after six months have elapsed; that the owner of a certificate of title, or a purchaser of registered property, need not go behind the certificate to ascertain if there are any claims which do not appear upon the certificate; that the property can be purchased in full reliance upon the certificate of title; and that, unless a lien or claim is noted as a memorial on the certificate, it is not a lien against the registered interest of the owner. These decisions establish a rule of property by which this Court is bound.

For more than fifty years the people of the State of Minnesota have been buying and selling properties registered under the Torrens System with full and complete reliance upon the certificate of title and in the firm belief that the certificate of title disclosed the true nature of the status of the title, and that they were amply and fully protected under the laws of the State of Minnesota. A judgment in this action, in favor of the plaintiff, having as it does a claim of lien which was not filed in

accordance with the laws of the State of Minnesota, and which claim of lien was never at any time flied with the registrar of titles and noted as a memorial on the certificate of title, would completely defeat what has been a permanent rule of property in Minnesota for more than half a century.

To sustain the Torrens System of registration in Minnesota will not burden the United States. It could have established a lien on the land involved by merely following the plain and simple requirements of the applicable federal and state statutes. This it did not do.

The Court, therefore, concludes that the defendants Minnesota Federal Savings and Loan Association, Ralph D. Peltz and Edward C. Engdahl are entitled to a summary judgment of dismissal, and that the motion of the plaintiff for a summary judgment should be denied. It is so ordered.